Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE AMERICAN BIBLE SOCIETY, *et al.*,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian
of the Estate of LOUISE T. PETER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Effective July 3, 1997, Congress amended the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, to provide, *inter alia*, that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997). The accompanying House Report states that Congress so amended the Act to correct the Fifth Circuit's April 9, 1997, decision in this case, which, in the eyes of Congress, "indicates that the Charitable Gift Annuity Antitrust Relief Act of 1995 [wa]s not being interpreted as broadly as it was intended by Congress." H.R. Rep. No. 146, 105th Cong., 1st Sess., at 3 (1997). Citing *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), the House Report also states Congress' intention that "[a] defendant unsuccessful in obtaining dismissal or summary judgment based on the immunity granted" by the amended Act "will have the right to interlocutory appeal of that ruling." *Id.* at 5. Petitioners present three questions for consideration in light of this legislative reaction to the Fifth Circuit's decision:

1. Whether Congress' July 3, 1997, amendment of the Charitable Gift Annuity Antitrust Relief Act of 1995 requires this Court to reverse under *Schooner Peggy* and its progeny the Fifth Circuit's April 9, 1997, decision upholding the District Court's refusal to dismiss Respondent's claim that Petitioners violated the Sherman Act by "conspir[ing] to fix the rates of return on charitable gift annuities"?

2. Whether the Fifth Circuit's holding that it lacked jurisdiction to review the District Court's refusal to dismiss Respondent's antitrust claim conflicts with this Court's decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*, which hold that the denial of a motion to dismiss asserting an immunity from suit is immediately appealable where, as here, the defendants-appellants argue on appeal that the district court's denial of their motion to dismiss was based on an error of law concerning the scope of the asserted immunity?

3. Whether the Fifth Circuit abused its discretion under FED. R. APP. P. 38 by imposing sanctions against Petitioners for immediately appealing the District Court's denial of their motion to dismiss Respondent's antitrust claim?

PARTIES TO THE PROCEEDING

Petitioners are The American Bible Society, The Moody Bible Institute of Chicago, American Leprosy Missions, Inc., Southern Baptist Convention, General Conference Corporation of Seventh-Day Adventists, Loma Linda University, University of Colorado Foundation, Inc., Good Shepherd Home Foundation, American Baptist Foundation, American Baptist Foreign Mission Society, and The Evangelical Lutheran Church in America. Petitioners were Defendants-Appellants in the Court of Appeals. Respondent Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, was Plaintiff-Appellee in the Court of Appeals.

The other parties to the proceedings in the Court of Appeals were Defendants-Appellants The American Council on Gift Annuities, Inc., individually and as successor to the Committee on Gift Annuities, an unincorporated association, The Lutheran Church-Missouri Synod, The Texas District of the Lutheran Church-Missouri Synod, The Lutheran Foundation of Texas, Baptist Foundation of Texas, Gray, Plant, Mooty, Mooty & Bennett, Anderson University, Inc. d/b/a Anderson University, United Church of Christ, Mount Holyoke College, Northwestern University, Smith College, The Salvation Army, a New York Corporation, The Salvation Army, a Georgia Corporation, The Salvation Army, a California Corporation, The Salvation Army, an Illinois Corporation, Planned Giving Services, Inc., d/b/a Planned Giving Services, Hay/Huggins Company, Inc., Prerau & Teitell, Vassar College, St. Olaf College, Wittenberg University, and Appellant Dan Morales, as Attorney General of the State of Texas.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioners has any parent or subsidiary companies.

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Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the Court deems argument of this case to be unnecessary, Petitioners request that the Court grant the writ and summarily reverse the judgment of the Court of Appeals or, in the alternative, grant the writ, vacate the judgment below, and remand the case to the Fifth Circuit for reconsideration in light of Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997).

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-23a) is reported at 110 F.3d 1082. The opinion of the District Court (Pet. App. 24a-37a) is reported at 943 F. Supp. 685.

JURISDICTION

The Fifth Circuit entered judgment on April 9, 1997, and denied rehearing on May 21, 1997. Pet. App. 38a-40a, 41a-43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

This Petition involves the application of 28 U.S.C. § 1291, Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997), and FED. R. APP. P. 38, which are set forth at length at Pet. App. 47a-48a.

STATEMENT OF THE CASE

Effective December 8, 1995, Congress gave Petitioners a statutory immunity from Respondent's claim that

Petitioners violated the Sherman Act by conspiring to fix rates of return for charitable gift annuities. *See* Charitable Gift Annuity Antitrust Relief Act of 1995, Pub.L. No. 104-63, 109 Stat. 687 (1995). On April 19, 1997, the Fifth Circuit sanctioned Petitioners for immediately appealing the District Court's September 30, 1996, order refusing to dismiss Respondent's antitrust claim as Congress intended.

Effective July 3, 1997, Congress amended the Charitable Gift Annuity Antitrust Relief Act of 1995 to provide, *inter alia*, that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997).

Petitioners respectfully submit that the July 3, 1997, amendments to the Charitable Gift Annuity Antitrust Relief Act of 1995 vindicate their appeal of the District Court's September 30, 1996, order and confirm that the Fifth Circuit's imposition of sanctions was an abuse of discretion. Accordingly, Petitioners respectfully ask this Court to grant certiorari and reverse the Fifth Circuit's judgment. In the alternative, Petitioners request an order granting the writ, vacating the judgment below, and remanding the case for reconsideration in light of the new legislation.

A. Charitable Gift Annuities.

The House Report accompanying the July 3, 1997, amendments to the Antitrust Relief Act succinctly describes charitable gift annuities and the role of the American Council on Gift Annuities, Inc., ("the Council") in developing suggested rates of return for charitable gift annuities:

Charitable gift annuities and charitable remainder trusts are fundraising instruments defined and regulated under sections 501(m)(5) and 664(d) of the Internal Revenue Code. A person who enters into a gift annuity or charitable remainder trust agreement with a religious, charitable or educational institution makes a gift to the institution and receives a fixed income for life. Since the value of the gift received is more than the property transferred to the donor, a bargain sale has occurred, and the difference in values is deductible to the donor. *See* 26 U.S.C. § 1011(b).

The annuity rate applied to the value of the gift is the critical element in ensuring that the transaction will result in a meaningful gift to the charity. The American Council on Gift Annuities, a non-profit organization representing more than 1,500 charitable organizations and institutions, provides technical assistance to its members in determining appropriate annuity rates. The rates recommended by the Council are based on actuarial studies of mortality experience among annuitants and a conservative projection of the rate of income to be earned on invested reserve funds. They are computed to produce an average "residuum" or gift to the organization of between 40 and 60 percent of the amount originally donated under the agreement. Consequently, the rates are lower than and are not in competition with any rates offered commercially.

H.R. Rep. No. 146 at 2. The House Report notes that the Council promotes the use of its rates for two reasons: (1) "it protects the fiscal integrity of the charity," and (2) "it ensures that donative intent rather than financial gain motivates the choice of recipient." *Ibid.* Petitioners, who are sponsors of the Council, issue charitable gift annuities.

B. Proceedings and Disposition Below.

In December 1994, Dorothy Ozee, the predecessor in interest to Respondent Boyd L. Richie, filed this action in the United States District Court for the Northern District of Texas, Wichita Falls Division, invoking federal-question jurisdiction under 28 U.S.C. §§ 1331 & 1337 and seeking, *inter alia*, treble damages under Section 1 of the Sherman Act, 15 U.S.C. § 1. Ozee, then Richie, claimed that the alleged practice of Petitioners and other sponsors of the American Council on Charitable Gift Annuities, Inc., of setting uniform rates of return for charitable gift annuities defined by 26 U.S.C. § 501(m)(5) constitutes a horizontal price-fixing agreement that is *per se* unlawful under Section 1. Thus, Respondent has alleged that Petitioners and others "entered into contracts, combinations, and conspiracies to fix the rates of return on charitable gift annuities and methods for calculating such returns," that "[t]he purpose, intent, and effect of such agreements [was] to fix rates of return on charitable gift annuities," and that such alleged conduct "constitutes a *per se* violation of section one of the Sherman Act, 15 U.S.C. § 1." Pet. App. 80a-81a.

In response to Respondent's antitrust allegations, Congress unanimously enacted the Charitable Gift Annuity Antitrust Relief Act of 1995 ("the Antitrust Relief Act"). As originally enacted, the Antitrust Relief Act provided that "it shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) of title 26 that are exempt from taxation under section 501(a) of title 26 to use, or to agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities." 15 U.S.C. § 37 (Supp. 1995). As the House Report confirms, Congress specifically intended the Antitrust Relief Act to immunize from Sherman Act scrutiny the alleged price-fixing agreement challenged in this action:

> Charitable giving through gift annuities is threatened by a lawsuit currently pending in the United States District Court for the Northern

District of Texas. *Richie v. American Council on Gift Annuities* (Civ. No. 7:94-CV-128-X) . . . .

> The ongoing litigation is causing charities to expend massive amounts of time and resources on defending their positions. It is also forcing these organizations to make public information about their donors, a fact which makes people who guard their privacy reluctant to give. Regardless of the outcome of the suit, it has already had and will continue to have a chilling effect on gift giving and . . . is consuming financial resources which would otherwise be allocated to charitable missions.
>
> * * *
>
> Enactment of H.R. 2525 will provide a complete defense to the antitrust portions of *Richie*, as well as protection from future suits based on the use of agreed-upon annuity rates.

H.R. Rep. No. 336, 104th Cong., 1st Sess., at 2-4 (1995).

Upon enactment of the Antitrust Relief Act, Petitioners and other defendant charities moved promptly to dismiss Respondent's Sherman Act claim. In response, Respondent moved to file a Fourth Amended Class Action Complaint alleging that some of the participants in the alleged rate-setting agreement are not entities "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" within the meaning of the Antitrust Relief Act. Relying on the discredited reasoning of the Ninth Circuit in *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), *rev'd sub nom., Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993), Respondent argued that the Act did not bar a Section 1 claim alleging a "hybrid" conspiracy among "exempt" and "non-exempt" entities.

In reply, Petitioners argued that Respondent's attempt to evade dismissal by challenging various charities' 501(c)(3) statuses was futile. First, Petitioners argued that Congress used the language "described in section 501(c)(3)" and "exempt from taxation under section 501(a)" as a traditional

shorthand reference to 501(c)(3) organizations -- not as a factual element of the exemption granted by the Antitrust Relief Act.[1] Second, Petitioners argued that the Act's legislative history revealed a specific congressional intent to immunize non-501(c)(3) entities from antitrust liability for assisting charities in setting rates for charitable gift annuities. Third, Petitioners argued that the District Court lacked jurisdiction to review the IRS' prior determinations of the defendant charities' respective 501(c)(3) statuses. Fourth, Petitioners argued that Respondent's reading of the Act to leave so-called "hybrid" conspiracies subject to antitrust scrutiny ignored fundamental antitrust principles this Court set forth in *Hartford Fire Insurance Company v. California*, 509 U.S. 764 (1993).

On September 30, 1996, the District Court granted Respondent leave to file his Fourth Amended Complaint and denied Petitioners' motion to dismiss. The District Court held that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the Antitrust Relief Act was not merely a shorthand reference to recognized 501(c)(3) organizations but a factual element of the antitrust exemption granted by the Act. Further, the District Court held that, regardless of prior IRS determinations of charities' respective tax-exempt statuses, the Act's protections were available only to charities proven in court to be "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" and that any defendant proven to be so described and so exempt would nevertheless lose the Act's protection if it were found to have participated in a rate-setting agreement with a "non-exempt" entity. Thus, the District Court concluded that

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[1]Petitioners cited to the District Court twenty-two federal statutes (other than the Internal Revenue Code) and thirty federal regulations (other than tax regulations) that similarly define or refer to charities as organizations that are both "described in section 501(c)(3)" and "exempt from taxation under section 501(a)." To Petitioners' knowledge, none of those statutes or regulations contemplates a fact finding by any court or any administrative agency other than the IRS.

each defendant seeking to invoke the Act's protection must plead and prove (i) that it was "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" ***and*** (ii) that every entity with whom it allegedly conspired also was so described and so exempt. Accordingly, the District Court refused to dismiss Respondent's antitrust claim. Pet. App. at 27a-32a.

Petitioners, whose respective tax-exempt statuses have never been challenged, timely appealed under the *Cohen* doctrine the District Court's conclusions that Petitioners had the burden to plead and prove the applicability of the Antitrust Relief Act and that each defendant's immunity from suit under the Act turned on in-court proof of the tax-exempt status of each and every alleged conspirator.

After a motions panel expedited Petitioners' appeal, the District Court sent a letter to the Fifth Circuit stating: "I wrote [in the September 30 Order] that there is an issue of whether an exempt entity conspiring with a non-exempt entity would . . . vitiate the exemption. That issue was not squarely before me, but at first blush the plaintiffs' position seemed correct. ***After reading more cases and further consideration of the arguments I would now say I am not so sure of the plaintiffs' position.***" Pet. App. at 110a (emphasis added).

Notwithstanding the District Court's equivocation on the "hybrid" conspiracy question, the Fifth Circuit -- without addressing the District Court's conclusion that Petitioners had the burden to plead and prove the applicability of the Act -- affirmed the September 30 Order and imposed monetary sanctions against Petitioners under FED. R. APP. P. 38. Pet. App. at 7a-11a, 21a-22a. Despite Petitioners' well founded arguments based on the language, structure and history of the Antitrust Relief Act, including those made in a separate reply brief devoted entirely to the "hybrid" conspiracy issue, *see id.* at 83a-104a, the Court of Appeals held that Petitioners' counsel had failed to "come to grips" with Respondent's allegation of a "hybrid" conspiracy among "exempt" and "non-exempt" entities. *Id.* at 21a-22a.

On May 21, 1997, the Fifth Circuit declined to rehear Petitioners' appeal. On June 11, 1997, the Court of Appeals denied Petitioners' motion to stay its mandate pending disposition of a petition for a writ of certiorari. On June 19, 1997, Justice Scalia denied Petitioners' application to recall the Fifth Circuit's mandate pending certiorari.

On July 3, 1997, just two weeks after Justice Scalia denied Petitioners' application, President Clinton signed into law the Charitable Donation Antitrust Immunity Act of 1997 ("the Immunity Act"), Pub.L. No. 105-26, 111 Stat. 241 (1997). The Immunity Act amended Section 2 of the Antitrust Relief Act, 15 U.S.C. § 37, to provide that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "any person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct." Pub.L. No. 105-26, 111 Stat. 241 (1997). Section 3 of the Immunity Act provides that the "Act, and the amendments made by th[e] Act, shall apply with respect to all conduct occurring before, on, or after the date of the enactment of th[e] Act and shall apply in all administrative and judicial actions pending on or commenced after the date of the enactment of th[e] Act," July 3, 1997. *Id.*

The House Report accompanying the unanimously adopted Immunity Act states that Congress swiftly amended the Antitrust Relief Act because the Fifth Circuit had misinterpreted the Antitrust Relief Act and failed to implement Congress' legislative intent:

> Charitable giving through gift annuities and charitable trusts continues to be threatened by a lawsuit currently pending in the United States District Court for the Northern District of Texas.

Richie v. American Council on Gift Annuities, Inc. (Civ. No. 7:94-CV-128-X). . . .

In recognition of the potential impact of this litigation on charitable giving, Congress enacted (by a vote of 427-0 in the House, and by voice vote in the Senate) the "Charitable Gift Annuity Antitrust Relief Act of 1995" (15 U.S.C. § 37, *et seq.*) . . . .

Enactment of the 1995 Act was anticipated to provide a complete defense to the antitrust portions of *Richie*, as well as protection from future suits based on the use of agreed-upon annuity rates. Unfortunately, that has not proven to be the case. A recent decision by the United States Court of Appeals for the Fifth Circuit, *Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082 (5th Cir. 1997), upheld the denial of a motion to dismiss based on an assertion of the new antitrust exemption. This decision, and the ruling of the District Court, indicates that the Charitable Gift Annuity Antitrust Relief Act of 1995 is not being interpreted as broadly as it was intended by Congress.

[The Immunity Act] replaces current law with language drafted in broader terms, so as to ensure that the provision will be interpreted by the courts in a manner which will achieve the goals of the 1995 Act. Enactment of the [Immunity] Act is intended to obviate the need for further litigation over the antitrust portions of the *Richie* case, in that it extends complete immunity to all defendants being sued for participation in the issuance of a charitable gift annuity or charitable remainder trust.

H.R. Rep. No. 146, 105th Cong., 1st Sess., at 2-3 (1997).

REASONS TO GRANT THE WRIT

Petitioners respectfully submit that the Fifth Circuit's decision would merit this Court's review even if Congress had not amended the Antitrust Relief Act to reject the Fifth

Circuit's reasoning. The Fifth Circuit's analysis of the 1995 version of the Act violated the first principle of statutory construction by ignoring Congress' manifest purpose in enacting the statute and by making each charity's immunity turn on an immaterial issue of fact having no antitrust significance. Further, the Court of Appeals' jurisdictional analysis conflicts with *Behrens v. Pelletier*, 116 S. Ct. 834 (1996), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Finally, imposing sanctions in this case of first impression under the Antitrust Relief Act was a clear abuse of discretion.

Congress' speedy amendment of the Antitrust Relief Act to vindicate Petitioners' contentions on appeal confirms the propriety of review in this Court, as it demonstrates beyond question that the Fifth Circuit misconstrued the 1995 Act, that Petitioners' appeal was proper, that sanctions were not warranted, and that rescuing the nation's charities from wasteful antitrust litigation is a compelling federal interest warranting Congress' and this Court's careful attention.[2]

A. Congress' Speedy Amendment of the Antitrust Relief Act Justifies Review By Certiorari.

The Fifth Circuit ostensibly dismissed Petitioners' appeal for lack of jurisdiction, without reaching its merits.

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[2]Petitioners' failure to obtain a stay of the Fifth Circuit's mandate has required them to defend themselves in the District Court while seeking review in this Court. Thus, Petitioners recently moved in the District Court to dismiss Respondent's antitrust claim pursuant to the newly amended Act. As the District Court lacks this Court's authority and responsibility to vacate the Fifth Circuit's erroneous jurisdictional holding and unjust imposition of sanctions, however, the pendency of Petitioners' renewed motions to dismiss does not diminish the need for this Court's intervention by writ of certiorari. At the very least, this petition merits an order granting certiorari, vacating the Fifth Circuit's judgment, and remanding this case for reconsideration in light of the new legislation. Indeed, the apparent need for a stringent standard for imposing appellate sanctions in cases of first impression and the apparent need for guidance in applying the *Cohen* doctrine in cases involving claimed immunities from the antitrust laws easily justify granting the writ and setting this case for argument.

Pet. App. at 10a-11a, 23a. Indeed, the Court of Appeals cited lack of appellate jurisdiction as its reason for refusing to consider one of Petitioners' principal arguments for reversal. *Id.* at 11a. Nevertheless, the Fifth Circuit clearly issued a ruling on the merits of Petitioners' claim to immunity under the 1995 version of the Antitrust Relief Act:

> . . . [E]ven assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

Pet. App. at 9a.

In the wake of the Fifth Circuit's ruling that Petitioners "may not reap [the] benefits" of the Antitrust Relief Act, Congress quickly amended the Act to provide, *inter alia*, that "the antitrust laws . . . shall not apply to charitable gift annuities" and that "***any person*** subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct . . . ." Pub.L. No. 105-26, 111 Stat. 241 (1997) (emphasis added). Further, Congress directed that those amendments "shall apply with respect to all conduct occurring before, on, or after the date of the enactment of this Act and shall apply in all administrative and judicial actions pending on or commenced after" July 3, 1997, including this action. *Id.* This immediate and decisive legislative reaction justifies an equally immediate and

decisive judicial reaction. Accordingly, this Court should grant the writ and apply the new legislation to reverse the Fifth Circuit's judgment under the time-honored rule of *Schooner Peggy*.

1. Under *Schooner Peggy*, this Court Must Apply the 1997 Version of the Act.

As noted *supra* at 8-9, the House Report accompanying the July 3, 1997, amendments to the Antitrust Relief Act states that Congress enacted those amendments because the Fifth Circuit, in affirming the District Court's denial of Petitioners' motion to dismiss, had misinterpreted the Antitrust Relief Act. *See* H.R. Rep. No. 146 at 3. Congress' authority to correct misinterpretations of federal statutes through such retrospective legislation is beyond question:

> Congress . . . has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product.

Rivers v. Roadway Exp., Inc., 511 U.S. 298, 313 (1994); *see also Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

Also beyond question is this Court's duty to apply the law in effect when the Court renders its decision, even if that law differs from the law applied below:

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. See *United States v. Schooner Peggy*, 1 Cranch 103, 2 L. Ed. 49 (1801) . . . Article III creates a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the

> department as a whole. It is the obligation of the last court that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, 1 Cranch, at 109.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 115 S. Ct. 1447, 1457 (1995).

Under the rule of *Schooner Peggy*, this Court must apply retrospective legislation enacted during the pendency of an action, unless "'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 n. 14 (1974). Accordingly, this Court must review the Fifth Circuit's decision in this case under the 1997 version of the Antitrust Relief Act.

2. The 1997 Version of the Antitrust Relief Act Clearly Entitles Petitioners to Dismissal of Respondent's Antitrust Claims.

Congress' 1997 amendments to the Antitrust Relief Act require the dismissal of Respondent's antitrust claim.

First, Congress' amendment of the Act to provide in Section 2(a) that "the antitrust laws . . . shall not apply to charitable gift annuities" requires dismissal by removing from Sherman Act scrutiny all activities concerning charitable gift annuities. Under the new Section 2(a), an allegation of injury resulting from the plaintiff's "purchase" of a charitable gift annuity presents no more of a federal antitrust claim than an allegation of injury resulting from a slip on a banana peel. Thus, Respondent's claim that Petitioners unlawfully restrained trade by fixing rates of return for charitable gift annuities does not even implicate -- much less state a claim under -- the Sherman Act.

Second, Congress' amendment of the Act to provide in Section 2(b) that "any person subjected to any legal

proceeding . . . under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or payment of charitable gift annuities . . . shall have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such] conduct" requires dismissal by immunizing Petitioners from Respondent's antitrust claim.

The gravamen of Respondent's antitrust claim is that Petitioners and others violated Section 1 of the Sherman Act by conspiring to establish and use uniform rates of return for charitable gift annuities. *See* Pet. App. at 51a-53a, 56a, 73a-81a. The plain language of Section 2(b) grants Petitioners an "immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for [such alleged] conduct . . . ." Pub. L. No. 105-26, § 2, 111 Stat. 241 (1997). Moreover, the accompanying House Report confirms that granting such an immunity is precisely what Congress intended. *See* H.R. Rep. No. 146 at 3 (stating that Immunity Act's amendment of Antitrust Relief Act "is intended to obviate the need for further litigation over the antitrust portions of the *Richie* case, in that it extends complete immunity to all defendants being sued for participation in the issuance of a charitable gift annuity or charitable remainder trust"). Thus, there is no question that Respondent's antitrust claim should be dismissed under Sections 2(a) and 2(b) for failure to state a claim on which relief can be granted.[3]

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[3]As demonstrated above, Sections 2(a) and 2(b) of the amended Act entitle Petitioners to judgment on Respondent's antitrust claim as pleaded. Section 2(c) of the 1997 Act prevents Respondent from avoiding dismissal by once again cleverly amending his pleading.

Under the new Section 2(c), a mere ***allegation*** of conduct arguably falling outside the scope of the immunity -- i.e., fixing the rate of return for unspecified "annuities" -- would not deprive charities of their right to obtain dismissal of antitrust claims challenging their immunized conduct involving charitable gift annuities. Thus, Section 2(c) provides

B. The Fifth Circuit's Jurisdictional Holding Conflicts with this Court's Decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*.

The Fifth Circuit's jurisdictional holding also merits the Court's review, as it directly conflicts with this Court's decisions in *Behrens v. Pelletier* and *Mitchell v. Forsyth*, which hold that the denial of a motion to dismiss asserting an immunity from suit is immediately appealable where, as here, the defendants-appellants argue on appeal that the district court's order denying dismissal turns on an erroneous legal conclusion concerning the scope of immunity. *See Behrens*, 116 S. Ct. at 838-42; *Mitchell*, 472 U.S. at 524-30.

A defendant may not immediately appeal an order denying immunity where the defendant-appellant argues merely that the district court erred in concluding that the record is insufficient to establish beyond dispute a factual issue that the defendant-appellant concedes to be material to its asserted right to immunity. *See Behrens*, 116 S. Ct. at 842 (discussing *Johnson v. Jones*, 115 S. Ct. 2151, 2156-59 (1995)). On the other hand, a defendant may immediately

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that a charity sued for fixing the rate of return for unspecified "annuities" may obtain an immediate summary judgment by showing either (1) that the plaintiff treated the "annuities" at issue as charitable gift annuities in an IRS filing or (2) that the donee treated the "annuities" as a charitable gift annuities in a document provided to the donor. Pub. L. No. 105-26, § 2, 111 Stat. 241 (1997). Upon such a showing, Section 2(c) entitles the defendant to a ***conclusive*** presumption that the "annuities" at issue are "charitable gift annuities" within the meaning of the 1997 Act, unless the plaintiff proves that "there has been a final determination by the Internal Revenue Service that, for fraud or otherwise, the donor's annuity . . . did not qualify . . . as a charitable gift annuity . . . when created." *Id.* Absent such a showing by the plaintiff, Section 2(c) entitles the defendant to the immunity from suit conferred by Section 2(b).

The manifest purpose of Section 2(c) is to prevent artful pleading from depriving defendants of the immunity conferred by Section 2(b). It also removes any perceived need for federal courts to shoulder the IRS' burden of administering Sections 501(c) and 501(m) of the Internal Revenue Code. *See* H.R. Rep. No. 146 at 6.

appeal an order denying a motion to dismiss where the defendant-appellant argues that the district court erred in concluding that a disputed issue of fact is material to the defendant-appellant's asserted right to immunity. *See Behrens*, 116 S. Ct. at 839-40, 842; *Mitchell*, 472 U.S. at 524-30. Where the appellant challenges the district court's order denying immunity from suit on the ground that the district court erred as a matter of law by holding that a disputed but arguably immaterial issue of fact was material to the defendant-appellant's right to immunity, jurisdiction exists under the *Cohen* doctrine, regardless of the district court's willingness to revisit the immunity issue after discovery. *Behrens*, 116 S. Ct. at 839-40, 842; *Mitchell*, 472 U.S. at 524-30; *see also Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396-97 (5th Cir. 1996) (holding that denial of state entity's motion to dismiss a private antitrust suit "on the ground of state action immunity easily meets the[] requirements" of the *Cohen* doctrine); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995) (holding that denial of private entity's claim of state-action immunity from civil damages suit under antitrust laws was immediately appealable under collateral-order doctrine), *cert. denied*, 116 S. Ct. 1678 (1996).

Here, the Fifth Circuit held that *Cohen* jurisdiction did not exist because the District Court's denial of Petitioners' claimed entitlement to immunity under the Antitrust Relief Act was based on the existence of a disputed issue of fact: whether each entity alleged to have conspired to fix rates of return for charitable gift annuities is described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a). *See* Pet. App. at 10a-11a. That holding conflicts directly with *Behrens* and *Mitchell*.

The District Court denied Petitioners' motion to dismiss due to the existence of an issue of fact only because the District Court made a pure error of law by deciding -- at a logically prior step in its analysis -- that the 1995 Act did not protect "hybrid" conspiracies between "exempt" and "non-exempt" entities. Had the District Court agreed with

Petitioners' legal argument that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the 1995 Act was merely a shorthand reference to recognized 501(c)(3) entities rather than a factual element of the Act's exemption, the District Court would have concluded that the factual issue raised by Respondent's allegation of a "hybrid" conspiracy was irrelevant to Petitioners' claimed right to immunity under the 1995 Act. Accordingly, the District Court's denial of Petitioners' motion to dismiss due to the existence of a disputed fact question actually turned on a pure issue of law, and the Fifth Circuit clearly had appellate jurisdiction under this Court's decisions in *Behrens* and *Mitchell*.[4]

Moreover, even if the presence of an issue of fact deprived the Fifth Circuit of jurisdiction to review the District Court's rejection of Petitioners' claim of immunity under the 1995 Act, Petitioners' entitlement to immunity under the currently applicable 1997 version of the Act clearly presents a pure question of law. Section 2(b) of the 1997 Act grants immunity to "***any*** person subjected to any legal proceeding for damages, injunction, penalties, or other relief of any kind under the antitrust laws . . . on account of setting or agreeing to rates of return or other terms for, negotiating, issuing, participating in, implementing, or otherwise being involved in the planning, issuance, or

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[4]The Fifth Circuit's misapplication of the collateral-order doctrine is apparent in its statement that, "[e]ven were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501(c)(3) determinations are factual." Pet. App. at 11a n.11 (citations omitted). If, as Petitioners contend and the Fifth Circuit assumed for sake of argument, "the Relief Act legalize[d] conspiracies between exempt and non-exempt entities," then the status of the Defendants as "exempt" or "non-exempt" is irrelevant, and the Fifth Circuit's statement that jurisdiction is lacking because Richie's challenges concerning this irrelevant issue "are factual" cannot be correct. A factual dispute concerning an immaterial issue is no bar to *Cohen* jurisdiction. *Behrens*, 116 S. Ct. at 842.

payment of charitable gift annuities . . . ." (Emphasis added). Under the 1997 version of the Act, Petitioners' motion to dismiss Respondent's antitrust claim for "conspir[ing] to fix the rates of return on charitable gift annuities" clearly cannot be defeated by a factual inquiry. Accordingly, any defect in the Fifth Circuit's jurisdiction to hear Petitioners' appeal was cured by the 1997 legislation. *See* H.R. Rep. No. 146 at 5 ("A defendant unsuccessful in obtaining dismissal or summary judgment based on the immunity granted" by the 1997 Act "will have the right to interlocutory appeal of that ruling. *Behrens v. Pelletier*, 116 S. Ct. 834 (1996).").

C. Imposing Appellate Sanctions in this Case of First Impression under the Antitrust Relief Act Was an Abuse of Discretion Meriting this Court's Review.

Imposing appellate sanctions in any case of first impression is a dangerous enterprise, because it tends to chill development of the law and unduly expose the judicial temperament of the sanctioning court to criticism if the legal conclusions underlying its findings of frivolity are later rejected by this Court or, as in this case, by Congress. Imagine, for example, how overzealous it would have appeared in hindsight for the Ninth Circuit to have sanctioned the defendants-appellants in the above-cited *Behrens* and *Hartford Fire Insurance* cases, who lost in that court jurisdictional and immunity arguments similar to those at issue here, only to prevail on those arguments in this Court. Where appellants have acted in good faith in pressing novel arguments, merely being wrong -- or being ***perceived*** by the court of appeals to be wrong -- should rarely, if ever, be enough to justify sanctions. Imposing sanctions in this case of first impression under a statute that the District Court and the Fifth Circuit conceded to have been enacted to dispose of this very lawsuit, *see* Pet. App. at 5a-6a, 25a-26a,29a, was a clear abuse of discretion warranting this Court's review on writ of certiorari.

1. Basing Sanctions on the Fifth Circuit's Jurisdictional Analysis Was a Clear Abuse of Discretion.

As noted above, the Fifth Circuit concluded that it lacked jurisdiction under the *Cohen* doctrine because the District Court's denial of Petitioners' motion to dismiss under the 1995 version of the Antitrust Relief Act was based on the District Court's conclusion that Respondent's Fourth Amended Class Action Complaint presented a genuine issue of material fact: whether Petitioners had conspired with "non-exempt" entities to fix rates of return for charitable gift annuities. Pet. App. at 10a-11a. Describing its conclusion that jurisdiction was lacking under the *Cohen* doctrine as "obvious" and "not arguable," the Fifth Circuit imposed monetary sanctions against Petitioners for "collaterally appeal[ing] the district court's ruling in the face of its true basis." *Id.* at 21a-22a. Because the Fifth Circuit's conclusion that it lacked jurisdiction was wrong as a matter of law, its reliance on that analysis to impose sanctions against Petitioners was an abuse of discretion.

The District Court's conclusion that Petitioners were not entitled to dismissal under the 1995 Act resulted from a five-step reasoning process. The District Court held:

> (1) that the phrase "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" in the 1995 Act was not merely a shorthand reference to recognized 501(c)(3) entities but a factual element of the Act's exemption,
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> (2) that, regardless of prior IRS determinations of charities' respective tax-exempt statuses, the Act's protections were available only to defendants proven in court to be "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26,"
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> (3) that any defendant proven to be so described and so exempt would nevertheless lose the Act's

protection if it were found to have participated in a rate-setting agreement with a "non-exempt" entity, (4) that, in light of the Respondent's allegations of a "hybrid" conspiracy among "exempt" and "non-exempt" entities, each defendant seeking to invoke the protections of the Antitrust Relief Act must plead and prove (i) that it was "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26" and (ii) that every entity with whom it allegedly conspired to set annuity rates also was so described and so exempt, (5) that Petitioners had not carried that burden.

See Pet. App. at 27a-32a.

On appeal, Petitioners argued that the District Court's reversible legal error lay in the first four steps of its five-step reasoning process. Petitioners argued that the plain language of the Antitrust Relief Act embodied the fundamental antitrust principle that, to be unlawful, a price-fixing agreement must be between or among 2 or more horizontal competitors. In Petitioners' view, the plain language of the Act immunized rate-setting agreements involving 501(c)(3) entities and others, because such agreements would be unlawful, if at all, only insofar as they involve 2 or more horizontal competitors -- that is, 2 or more 501(c)(3) entities capable of issuing charitable gift annuities. Further, Petitioners argued that reading the Act to make an issuer's immunity turn on allegations of non-exempt activities by others would unfairly penalize charities without advancing any discernible antitrust or tax policy. Finally, Petitioners argued that reading the Act to make issuers' immunity turn on the 501(c)(3) statuses of others frustrated Congress' unambiguous intent by destroying charities' incentives to participate in rate-setting agreements. *See* Pet. App. at 83a-104a.

The Fifth Circuit clearly understood that Petitioners were challenging the District Court's interpretation of the Antitrust Relief Act to make each charity's immunity turn on the bona fide 501(c)(3) status of every other participant

in the alleged conspiracy. Indeed, the Court of Appeals addressed and rejected that challenge on its merits:

> . . . [E]ven assuming that the Relief Act creates an immunity from suit rather than a substantive rule of decision on the merits (a question we do not reach), the defendants may not reap its benefits. As the Relief Act covers only agreements between "2 or more persons described in section 501(c)(3) of Title 26 that are exempt from taxation under section 501(a) of Title 26 . . .," its plain language does not reach conspiracies involving both exempt and non-exempt entities.

Pet. App. at 9a. Nevertheless, the Fifth Circuit's jurisdictional analysis focused solely on the fifth step of the District Court's reasoning process.

The Court of Appeals apparently failed to recognize that the District Court's conclusion in step five of its reasoning process -- that a fact issue barred dismissal -- was simply the product of its antecedent legal conclusions in steps 1 through 4, which Petitioners challenged on appeal. Thus, the Court of Appeals failed to recognize that, even if the District Court was correct to conclude that the 1995 Act did not immunize so-called "hybrid" conspiracies, Petitioners' challenge to that dispositive legal conclusion on appeal gave the Fifth Circuit appellate jurisdiction under *Behrens* and *Mitchell*.

In light of the Fifth Circuit's jurisdictional error, its imposition of appellate sanctions was an abuse of discretion.

2. Basing Sanctions on the Fifth Circuit's Misinterpretation of the Antitrust Relief Act Also Was an Abuse of Discretion.

In concluding that the District Court properly denied Petitioners' motion to dismiss, the Fifth Circuit held that the "plain language" of the 1995 version of the Antitrust Relief Act compels the conclusion that ***only*** bona fide 501(c)(3) organizations are entitled to the Act's immunity and that the participation of even one non-501(c)(3) entity in an

otherwise immunized rate-setting agreement destroys the immunity for all participants. Pet. App. at 9a-10a. Citing Respondent's conclusory allegations that the Council and some of its sponsors are not bona fide 501(c)(3) entities, the Fifth Circuit erroneously concluded that Respondent had pleaded facts that, if true, would deprive Petitioners of immunity. *Id.*

As demonstrated below, the Fifth Circuit's interpretation of the 1995 Act effectively nullified it without advancing any discernible public policy. Thus, imposing sanctions against Petitioners' for failing to recognize that interpretation as "obvious" was a clear abuse of discretion.

a. The Fifth Circuit's Interpretation Ignored Common Antitrust Principles.

The Fifth Circuit erred in concluding that the "plain language" of the 1995 Act compelled the conclusion that an agreement among 501(c)(3) entities and non-501(c)(3) entities falls outside the Act's immunity. Read in light of generally applicable principles of antitrust law, the 1995 Act plainly immunized Petitioners from Respondent's price-fixing claim, regardless of the 501(c)(3) status of the Council or any other non-issuer.

i. Only Competitors Can Price Fix; The Participation of Non-Competitors Is Irrelevant.

To violate Section 1 of the Sherman Act, a horizontal price-fixing agreement must be an agreement between or among competitors. "[A]n agreement not to compete between two parties who are not actual or potential competitors is not per se or otherwise illegal." *United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990), *cert. denied sub nom., Rutland v. United States,* 499 U.S. 936 (1991). Thus, the defining quality of an unlawful horizontal price-fixing agreement is the participation of at least two entities that

compete with one another in the same market. *See, e.g., Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 470 (5th Cir. 1992). Although participation by persons who do not compete with other members of the conspiracy does not negate the existence of an actionable price-fixing agreement, such participation is neither a necessary nor a sufficient condition to antitrust liability. For antitrust purposes, the participation of such non-competitors is wholly irrelevant.[5]

ii. The Text of the 1995 Act Reflected the Necessity of Horizontal Competition.

Read in light of the fundamental requirement of horizontal competition, the plain language of the 1995 Act immunized all combinations alleged to be unlawful on the ground that they constituted horizontal agreements to fix the rates of return for charitable gift annuities. The 1995 Act immunized all such combinations by immunizing the aspect of each that allegedly would violate the law: a rate-setting agreement between or among two or more horizontal "competitors" for the issuance of charitable gift annuities -- that is, "2 or more persons described in section 501(c)(3) of title 26 that are exempt from taxation under section 501(a) of title 26." Because the 1995 Act provided that it shall not be unlawful for two or more "competing" issuers of charitable gift annuities to set uniform rates of return, the Act necessarily provided that it shall not be unlawful for two

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[5]Thus, contrary to footnote 10 of the Fifth Circuit's opinion, there is no generally applicable "rule of forfeiture" providing that an "exempt entity" that conspires with a "non-exempt entity" loses its antitrust immunity. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781-84 (1993) (Capper-Volstead's "rule about acting in concert with nonexempt parties" is "inapplicable" outside the Capper-Volstead context). Rather, each exemption from the antitrust laws must be applied consistently with its purpose in light of antitrust principles. *See Hartford*, 509 U.S. at 783-84 (reasoning that antitrust exemption is not necessarily lost where parties who were entitled to such exemption engaged in concerted conduct with persons to whom exemption arguably did not apply).

or more "competing" issuers, joined by one or more "non-competing" non-issuers, to set such uniform rates.

The Fifth Circuit erred by making antitrust immunity turn on facts that cannot possibly affect "competition" in the "market" for charitable gift annuities. Commercial banks and insurance companies, for example, do not -- indeed, cannot -- issue charitable gift annuities. *See* 26 U.S.C. § 170(c). Nor do accountants, attorneys, or actuaries. *See id.* Thus, their participation in the alleged price-fixing scheme could have no antitrust impact in the "market" for charitable gift annuities. Further, Respondent has not even attempted to allege that the participation of such entities in the affairs of the Council had an impact on interstate commerce in the highly competitive market for commercial investment products, which is composed of thousands of sellers. Neither has Respondent alleged that his ward suffered injury by purchasing commercial investment products at rates that were lower than they would have been absent commercial entities' participation in the Council's affairs. Thus, the alleged involvement of commercial banks and insurance companies, like the involvement of attorneys, accountants, and actuaries, is irrelevant to the application of the Act to the allegations of this lawsuit.[6]

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[6]The legislative history of the 1995 Act confirms that Congress was not concerned by the role of the American Council or any other non-issuing entities. *See* H.R. Rep. No. 336, 104th Cong., 1st Sess., at 6 (1995) (stating that the Antitrust Relief Act was intended "to extend to attorneys, accountants, actuaries, consultants and others . . . when assisting [501(c)(3) organizations] in the issuance of a charitable gift annuity or the setting of charitable annuity rates"). Congress clearly intended the conduct immunized by the 1995 legislation "to include the act of publishing suggested annuity rates. Thus, a non-profit organization such as the American Council on Gift Annuities could not be in violation of the antitrust laws due to its publication of actuarial tables or annuity rates for use in issuing gift annuities." *Id.*

b. The Fifth Circuit's Interpretation of the 1995 Act Produced Absurd Results.

As demonstrated above, the Fifth Circuit erred by concluding that each issuer's immunity under the 1995 Act depended on the tax-exempt status of alleged co-conspirators that do not issue charitable gift annuities. The Fifth Circuit also erred by concluding that Congress intended each issuer's immunity to turn on the bona fide 501(c)(3) status of every other issuer. The latter error appears immediately upon consideration of the following example.

Assume a rate-setting agreement formed in 1996 between two issuers of charitable gift annuities: one proven in 1999 to be an organization described in 26 U.S.C. § 501(c)(3) and exempt from taxation under 26 U.S.C. § 501(a) and another proven in 1999 to fail the 501(c)(3) criteria. Under the Fifth Circuit's logic, the issuer proven to satisfy the 501(c)(3) criteria could be held liable regarding all charitable gift annuities issued by either issuer from 1996 through 1999, even if it had carefully examined the other issuer's IRS determination letter before entering what it justifiably believed to be a lawful rate-setting agreement. Further, because there is no right of contribution in antitrust cases, *see Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-46 (1981), the qualified issuer could -- at the sole election of the plaintiff -- be forced to pay the entire judgment, including treble damages and attorneys' fees, while the other issuer could avoid paying a dime in damages.

The Fifth Circuit's result was even more unjust. The Fifth Circuit's holding stripped charities of their immunity based on bare, conclusory ***allegations*** that some of the defendants are not bona fide 501(c)(3) entities. Because this result is "so bizarre that Congress 'could not have intended' it," the Fifth Circuit should have rejected it. *See Demarest v. Manspeaker*, 498 U.S. 184, 190-91 (1991) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

c. The Fifth Circuit Nullified the 1995 Act.

The 1995 version of the Antitrust Relief Act codified Congress' decision that, in order to achieve more important philanthropic goals, the "market" for charitable gift annuities will not be price competitive. By passing the Act, Congress sanctioned the elimination of "price" competition for charitable donations through charitable gift annuities so that charities may "compete" for such donations solely in terms of their good works. This is the only logical interpretation of permitting all issuers of charitable gift annuities "to use, or to agree to use," uniform rates.

By interpreting the 1995 Act to expose dozens of charities to the costs of litigation and the possibility of treble damages and attorneys' fees based on the mere ***allegation*** that a handful of others are not bona fide 501(c)(3) organizations, the Fifth Circuit thwarted the Act's purpose. By effectively making each charity the insurer of the 501(c)(3) status of every party to a rate-setting agreement, the Fifth Circuit's decision surely would have deterred charities from entering future rate-setting agreements aimed at achieving Congress' objective of removing "price" competition from the arena of charitable giving.

Moreover, the Fifth Circuit's nullification of the 1995 Act came at the service of nothing. Given Congress' acceptance of a "market" for charitable gift annuities that is devoid of price competition, it would be unreasonable to conclude that donors such as Respondent's ward suffered a cognizable antitrust injury simply because a few alleged participants in an otherwise lawful rate-setting agreement ***allegedly*** do not satisfy the criteria set forth in 26 U.S.C. § 501(c)(3). Certainly, the Fifth Circuit's opinion does not explain:

(1) how the participation of non-501(c)(3) organizations in an otherwise admittedly legal agreement could have possibly injured Respondent's ward by reducing price competition in the "market" for charitable gift annuities, which Congress has unanimously and unequivocally stated is one in which no price competition is required,

(2) why Congress might rationally have chosen to differentiate between rate-setting agreements in which no non-501(c)(3) entities are alleged to have participated and rate-setting agreements in which one or more non-501(c)(3) entities is alleged to have joined, or

(3) why, by so differentiating between rate-setting agreements, Congress might rationally have chosen to make charities' immunity from antitrust suits turn on the mere allegation of facts having no antitrust significance whatsoever.

Rather, the Fifth Circuit simply concluded, without any supporting logic, that the 1995 Act's "plain language" unavoidably compelled this result that frustrated Congress' intent, subjected as many as 1900 charities to suit for conduct Congress plainly intended to protect, and wasted the resources of those charities through further litigation. Imposing sanctions on that basis was an abuse of discretion.

3. The Actions of the District Court and Congress Belie the Propriety of Sanctions.

As demonstrated above, the legal conclusions underlying the Fifth Circuit's imposition of sanctions were wrong as a matter of law. But, even if the Fifth Circuit's legal conclusions had been correct, its determination that those conclusions were "obvious" and "not arguable" (Pet. App. at 21a-22a) is belied by the District Court's letter admitting that even the District Judge, "[a]fter reading more cases and further consideration of the arguments," was "not so sure of the plaintiffs' position" regarding the "hybrid conspiracy" issue. Pet. App. at 110a. Sanctioning Petitioners for failing to recognize as "obvious" a legal conclusion about which the District Court confessed misgivings in a letter the Fifth Circuit cited in its opinion imposing such sanctions (*see* Pet. App. at 22a) raises at least an appearance of impropriety. Moreover, Congress' recent amendments to the Antitrust Relief Act confirm that Petitioners' interpretation of the 1995 Act was far more consistent with its legislative intent

than the Fifth Circuit's. Accordingly, this Court, which has not previously articulated a standard to be applied under FED. R. APP. P. 38, should grant certiorari to correct the Fifth Circuit's abuse of its discretion under FED. R. APP. P. 38 and to articulate a stringent standard for imposing appellate sanctions in cases of first impression.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court grant their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. In the event that the Court deems argument of this case to be unnecessary, Petitioners request that the Court grant the writ and summarily reverse the judgment of the Court of Appeals or, in the alternative, grant the writ, vacate the judgment below, and remand the case to the Fifth Circuit for reconsideration in light of Section 2 of the Charitable Gift Annuity Antitrust Relief Act of 1995, 15 U.S.C. § 37, as amended by the Charitable Donation Antitrust Immunity Act of 1997, Pub.L. No. 105-26, 111 Stat. 241 (1997).

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